IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 11, 2007 Session

ALEXANDER & SHANKLE, INC. v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY

Appeal from the Chancery Court for Davidson County
No. 04-3694-I Claudia Bonnyman, Chancellor

No. M2006-01168-COA-R3-CV Filed on August 13, 2007

This is a contract dispute regarding the construction of two schools in Davidson County, Tennessee. The trial court granted the Metropolitan Government of Nashville and Davidson County (Metro) partial summary judgment, holding that the contractor, Alexander & Shankle, Inc., (A&S), was in default for breach of a "time of the essence" provision contained in the contract between the parties. We find that there are genuine issues of material fact relating to this issue, and so we reverse the ruling of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed

DONALD P. HARRIS, SR.J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J. and FRANK G. CLEMENT, JR., J., joined.

Richard M. Smith, Nashville, Tennessee, for the appellant, Alexander & Shankle, Inc.

Jeffrey S. Price, Jarrod W. Stone, Nashville, Tennessee, for the appellant, Ohio Farmers Insurance Company

Thomas G. Cross, Nashville, Tennessee, for the appellee, Metropolitan Government of Nashville and Davidson County.

OPINION

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The contract

On March 25, 2003, Metro and A&S entered into a contract under which A&S became general contractor for the construction of Oliver Middle School and Shayne Elementary School, which were both to be constructed on the same site. A&S was to be paid $11,841,000.00 for

completion of the project. The contract provided that "[a]ll limitations of time set forth herein are material and are of the essence of this contract." The contract also provided that A&S would be liable for liquidated damages suffered by Metro as a result of any delay until the project was substantially complete. Ohio Farmers Insurance Company acted as surety on a bond in the amount of five percent of the contract price to secure the performance of A&S according to the contract.

The contract provided for payment of the contract price at periodic intervals based upon the level of completion of the project. Metro had the right to refuse payment if Metro was of the opinion that A&S's rate of progress was such that substantial completion of the project would be delayed or that all or a portion of the work was not of high quality and without defects.

According to the contract, A&S was to communicate with Metro through the project architect or engineer. Any change to the plans and specifications could be made, under certain circumstances, by "field authorization." Changes that did not meet the criteria for field authorization were to be made by written "change order." Change orders were to reflect any changes in work, contract price and time of performance. According to the contract, change orders executed by A&S waived any claim against Metro for additional time or compensation. Performance of work pursuant to a field authorization or change order would constitute conclusive evidence of A&S's agreement to changes in the work and contract as amended by the field authorization or change order, including any changes to the contract price and time for performance.

The contract also provided for changes not included in the contract documents but considered necessary to complete the project. Such changes were to be documented in the form of a "request for proposal." Metro would then issue a "change directive" authorizing A&S to proceed with the work described in the request for proposal.

The contract provided that if A&S was delayed in performing a critical task because of some act or omission of Metro or someone acting in Metro's behalf, including an authorized change order, then A&S could submit a written request for an extension of time with Metro or its architect or engineer "setting forth in detail all known facts and circumstances supporting the claim." The contract defined a task as "critical" if it was on the critical path of the project schedule so that a delay in performing the task would delay the ultimate completion of the project. The contract required A&S to continue performance regardless of the existence of any such claim.

Finally, the contract provided for two methods of termination by Metro. The first allowed Metro to terminate the contract for any reason upon written notice and was referred to as a "termination for convenience." If the contract were terminated in this fashion, A&S was to be compensated for labor, material, equipment and services accepted under the contract and any costs that had been incurred in preparing to perform and in performing the terminated portion of the work. A&S was to also be compensated for the costs of settling claims of subcontractors and was to be allowed a fair amount for direct job site overhead and its profit under the contract. If, however, it appeared that A&S would not have profited or would have sustained a loss had the entire contract been completed, then no compensation for profit was to be included.

The second method of termination by Metro was "for cause." If A&S failed to perform any portion of its work in a timely manner, failed to supply adequate labor, supervisory personnel or proper equipment or materials or violated any material provision of the contract, then Metro had the right to terminate A&S's performance, assume possession of the site and complete the work. If the costs and expenses of completing the work exceeded the contract price, then A&S was liable for the excess costs. If such costs and expenses were less than the unpaid amount of the contract price, then A&S was to be paid the unused amount. The contract provided that, if a termination for cause was determined by a court of competent jurisdiction to be a termination without cause, the termination would be deemed a termination of convenience.

B. The perfomance

A&S was given a notice to proceed under the contract on April 1, 2003. From the beginning, there were significant delays in the project. Excavation at the site was initially delayed because a house located on the site had not been moved. According to the affidavit of Joe Miller, Assistant Vice-President of A&S and project manager for the construction, A&S was not allowed to demolish the house because it had been given to a private individual and Metro was waiting for that individual to make arrangements to have it moved. Miller stated that the house was finally moved April 23, 2003. In accordance with the contract, Miller requested an additional fifteen days because of the delay. The project architect, Rick Stoll, responded to this letter approving the fifteen-day request. The letter stated: "The additional time of 15 days is approved. It has been stated by the Owner that the original date of Substantial Completion should remain intact until the end of the job, at which time, a Change Order will be issued if the additional time is needed to complete the work."

Once the site preparation began, it was immediately discovered that poor soil conditions not anticipated by the contract documents would require corrective measures. It was not determined what would be done to remedy this condition until August 26, 2003, when the parties agreed to lower the elevation of Oliver Middle School and the surrounding area in order to provide fill material for the Shayne Elementary School building. Joe Miller, on behalf of A&S, requested an additional 110 days extension of time including "71 days for soil, 15 days for house removal delays, 3 days for providing additional drainage at Shayne Elementary, and 21 additional days for additional undercut of soil on the site . . ." Even though Miller had been involved in the negotiations for the 110-day extension, Metro approached A&S's president, John R. Shankle, who executed Change Order No. 1. Change Order No. 1, signed September 10, 2003, provided for an extension of 50 days and, by its terms, covered the following change:

> Modify subgrade elevation of Oliver Middle School and immediate surrounding area to provide fill material for Shayne Elementary School building pad as described in the attached letter from Alexander & Shankle, Inc., dated August 18, 2003.[1]

[1]While two copies of Change Order No. 1 were included in the record, the letter referred to was attached to neither.

Change Order No. 1 also provided that the date of substantial completion as of the date of the change order was July 15, 2004.

Because of the delay in the commencement of the project, the masonry work, which represented a significant portion of the work to be performed, was pushed into the winter months rather than the summer and fall months as originally contemplated. A&S asserted that this slowed the pace of performing the masonry work and, by mid-January 2004, it was apparent that the project would not be completed on time. About that time, Metro's architect was said to have admitted that the July 15, 2004, completion date was "not based on what is practical, but only on the desire of Metro to have the schools ready for the beginning of the 2004-2005 school [year]." After that time, however, Metro continued to revise the scope of the project work but steadfastly refused to alter the substantial completion date.

On February 23, 2004, the parties executed Change Order No. 2. This change order required A&S to remove and replace 15,436 cubic yards of unsuitable soil at the Shayne Elementary site. A&S requested an additional twenty-one days to perform this work, but Metro refused to grant any contract extension. Prior to executing Change Order No. 2, A&S notified Metro, in writing, that A&S was unable to sign the change order due to the denial of the requested extension of time. A&S explained that in an effort to keep the project moving forward, A&S would sign the change order with the understanding that A&S reserved the right to recapture the days lost from performing this work.

From mid-February 2004 through the end of July 2004, Metro continued to make changes in the scope of the work to be completed. The record contains thirteen letters from A&S to Metro or its representative requesting a total of 235 days additional contract time within which to perform the additional work. Many of these changes were incorporated into a construction change directive issued by Metro, but no additional contract time was given to A&S. Three of the letters are worthy of note.

A letter dated February 17, 2004 quoted the cost to "make kitchen hood and mechanical equipment room piping and cooling tower piping changes" and requested fourteen days additional contract time to perform the changes. Bob Heffington, the Project Manager for the Metropolitan Nashville Public Schools, wrote "Proceed" on the letter and signed it with the date June 9, 2004.

By letter dated June 15, 2004, A&S quoted the cost of providing ceiling diffusers at Shayne Elementary School and requested an additional forty days of contract time after authorization for their installation. Mr. Heffington returned this letter with the notation, "Proceed with installation. Time extension to be determined." This notation was signed by him and dated June 28, 2004.

In the third letter, dated June 3, 2004, A&S quoted the cost of providing an outside air supply for three heat pumps in the Shayne Elementary School and noted that the "mechanical subcontractor has requested 18 calendar days of contract time to perform the necessary work required to supply outside air to the heat pumps." On the same day, Rick Stoll, Metro's architect on the project, e-

mailed Joe Miller the following "Also please instruct Ryan Mechanical to: . . . [p]roceed with the work relative to adding a fresh air duct to HP-A1,2, and 3, per their proposal."

Despite Metro's representatives having ostensibly approved these extensions, Metro continued to assert the substantial completion date was July 15, 2004. After that date, Metro allowed A&S to continue working on the project and continued paying for work performed. There is evidence that Metro revised the scope of the project work five times during the month of July 2004, with three of the revisions coming after July 15, 2004. A&S and Metro agreed to alter the construction schedule to allow certain portions of each school to be constructed to accommodate students on the opening day of school. On July 27, 2004, A&S's mechanical subcontractor, by letter, quoted a price for acceleration at the Oliver school in order to complete its work there by August 8. Mr. Huffington accepted this proposal on July 27, 2004, and noted on the letter that the mechanical subcontractor's work at Shayne should be completed by August 2, 2004. On July 29, 2004, Mr. Huffington agreed to a proposal by the subcontractor that installed fire alarm and monitoring services to accelerate and complete that work by August 3, 2004. Also on July 29, 2004, Mr. Huffington accepted a proposal from the plumbing and HVAC subcontractor to accelerate its work and complete it by August 8, 2004, at Oliver and by August 2, 2004, at Shayne.

On July 29, 2004, Metro delivered to A&S a termination letter stating that, as of Friday, July 30, 2004, A&S would be relieved of their services because they had failed to meet the July 15, 2004, substantial completion date. A&S removed itself from the site and did no further work on the project. Metro completed construction of the schools by hiring a construction superintendent and primarily using A&S's subcontractors. A&S's project manager, Joe Miller, stated that he was told by Arnold Von Hagen, director of plant planning and construction for the Metropolitan Board of Public Education, that A&S was terminated in order to recoup the additional costs of having A&S's subcontractors accelerate their work.

C. Procedural Background

On December 30, 2004, A&S filed a complaint in the Chancery Court for Davidson County, alleging a cause of action against Metro for breach of contract as a result of Metro's improper termination of A&S from the project. Metro filed its answer February 10, 2005, accompanied by a counterclaim alleging that A&S had breached the construction contract by failing to substantially complete the project by July 15, 2004 and by supplying defective work and labor. Metro sought damages for breach of contract and correcting the defective work. Metro also filed a third-party complaint against Ohio Farmers Insurance Company (OFIC), A&S's surety on the performance bond.

On September 21, 2004, A&S filed a motion for partial summary judgment. The motion asserted that Metro's termination of A&S's contract was improper because it violated the express terms of the contract and because Metro did not give A&S proper notice and an opportunity to cure any alleged defects. Metro filed a motion for partial summary judgment contending that it properly

terminated A&S from the project for failing to complete the project within the time permitted under the contract pursuant to the "time is of the essence" provision in the contract.

The opposing motions for summary judgment were heard by the court on April 21, 2006. On May 2, 2006, the trial court entered an order granting Metro's motion for partial summary judgment, concluding that A&S had breached the contract by failing to meet the July 15, 2004 contract deadline for substantial completion of the project. The order directed Metro's attorney to draft a judgment consistent with Metro's theory of the case. It is apparent from the record that both parties submitted proposed judgments, but the proposed judgments were not made a part of the record. By order dated July 6, 2006, the trial court indicated it would prepare its own judgment. On July 12, 2004, the trial court entered a judgment granting Metro's motion for partial summary judgment and denying A&S's motion for partial summary judgment. The judgment provided that, pursuant to Rule 54 of the Tennessee Rules of Civil Procedure, the judgment was final, there being no just reason for delay. A&S and OFIC have appealed, alleging the trial court erred by granting Metro's motion for partial summary judgment and by denying A&S's motion for partial summary judgment.

II. STANDARD OF REVIEW

Summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, demonstrate that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Tenn. R. Civ. P. 56.04; Penley v. Honda Motor Co., 31 S.W.3d 181, 183 (Tenn. 2000); Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn. 1993). Since our inquiry involves purely a question of law, no presumption of correctness attaches to the lower court's judgment, and our task is confined to reviewing the record to determine whether the requirements of Rule 56 of the Tennessee Rules of Civil Procedure have been met. Penley, 31 S.W.3d at 183; Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 88 (Tenn. 2000); Seavers v. Methodist Med. Ctr., 9 S.W.3d 86, 90-91 (Tenn. 1999). Courts should "grant a summary judgment only when both the facts and the inferences to be drawn from the facts permit a reasonable person to reach only one conclusion." Staples, 15 S.W.3d at 89; Bain v. Wells, 936 S.W.2d 618, 622 (Tenn. 1997). In reviewing the record to determine whether summary judgment requirements have been met, we must view all the evidence in the light most favorable to the non-moving party. Penley, 31 S.W.3d at 183; Eyring v. Fort Sanders Parkwest Med. Ctr., 991 S.W.2d 230, 236 (Tenn. 1999); Byrd, 847 S.W.2d at 210-11.

Summary judgment proceedings are clearly not designed to serve as a substitute for the trial of genuine and material factual matters. Byrd, 847 S.W.2d at 210; see also Blocker v. Regional Med. Ctr, 722 S.W.2d 660, 663 (Tenn. 1987). The trial court should overrule the motion where a genuine dispute exists as to any material fact. Byrd, 847 S.W.2d at 211. A fact is material if it must be decided in order to resolve the substantive claim or defense at which the motion is directed. Id.

III. ANALYSIS

In rendering its partial summary judgment in favor of Metro, the trial court stated:

> Change Orders 1 and 2 represent a compromise of all of the Change Order Issues. Well prior to the time both those Change Orders were executed, the Change Order Issues had developed and the extra costs and rough magnitude of delays associated with them were apparent to [A&S]. [A&S] in fact asserted a claim for additional compensation and 110 days (roughly 3½ months) of additional Contract time on account of the Change Order Issues. The parties ultimately agreed, however, as reflected in the terms of Change Orders 1 and 2, that the Contract price would be increased by the total of 50 days to July 15, 2004. Although prior to executing Change Order 2, [A&S] sent Metro a letter ostensibly seeking to preserve some right to revisit the Change Order Issues, it nonetheless then expressly constituted a waiver of its right to seek any additional time or compensation on account of the Change Order Issues. Hence, [A&S] bore the risks associated with overcoming all delays associated with the Change Order Issues.
>
> As quoted above, Paragraph 5.8 of the Contract expressly made time of the essence. Further, Contract Paragraph 5.23(b) gave Metro the right to terminate the Contract for default if [A&S] failed "to perform the Work, or any part thereof, in a timely manner ..." Pursuant to Change Orders 1 and 2, the Project completion deadline was July 15, 2004. In addition, in June of 2004, a Metro representative approved in writing an [A&S] proposal to perform a certain extra work item for a specific sum and an extra 14 days of Contract time. Thus, the Project completion deadline became July 29, 2004.[2] The Project was undisputedly some 3½ months behind schedule as of May 26, 2004 on account of the Change Order Issues and remained behind schedule by essentially the same 3½ months at the time Metro terminated the Contract on July 29, 2004. Inescapably, [A&S] simply never recovered the 3½ months of Project delay caused by the Change Order Issues, for which [A&S] bore sole responsibility. [A&S] therefore was in material breach of the Contract for failing timely to "complete the Project work" or at least very substantial portions of the Project work. Accordingly, pursuant to Paragraph 5.23(b) of the Contract, Metro was within its rights to terminate for default on that basis . . .

In a footnote to the quoted material the trial court noted that A&S and OFIC alleged additional time extensions for other delays for which they claimed Metro was responsible. The trial court determined, however, that the Change Order Issues by themselves doomed the project to late completion and the other issues were, therefore, irrelevant. Finally, the trial court concluded that

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[2] A&S asserts in its brief this date was included in a proposed order submitted by Metro for the purpose of avoiding waiver issues created by allowing A&S to continue performance past the date Metro maintained at the time was the deadline for substantial completion.

A&S and OFIC had identified no acts of Metro that indicated Metro had waived its right to rely on the "time is of the essence" clause.

Keeping in mind that, in reviewing a trial court's granting of a motion for summary judgement, we must view the evidence in the light most favorable to the nonmoving party, we disagree with the determinations made by the trial court in several respects. First, we disagree with the trial court's conclusion that Change Orders 1 and 2, resolved all the change order issues. In our view, the facts in the record support more than that one conclusion. Joe Miller, A&S's project manager, requested Metro for a contract extension totaling 110 days, "71 days for soil, 15 days for house removal delays, 3 days for providing additional drainage at Shayne Elementary, and 21 additional days for additional undercut of soil on the site . . ." It is stated in OFIC's brief that Metro "surreptitiously approached A&S's President, John R. Shankle, who was unfamiliar with the circumstances surrounding A&S's requests for additional time, and convinced him to execute Change Order No. 1." While the pages of Joe Miller's deposition cited in support of this statement were not included in the record before us, we have found nothing in the record to indicate that Mr. Shankle knew of the contents of Mr. Miller's request or that Mr. Shankle intended the execution of Change Order No. 1 to be a compromise and settlement with regard to all those issues. The change order itself refers only to modifying the subgrade elevation at the Oliver Middle School and surrounding area to provide fill material for the Shayne Elementary School. On the record before us, the trier of fact could reasonably conclude that the change order was limited to that subject matter. Thus, the promise of a fifteen-day extension made by Rick Stoll, Metro's architect, for the delay caused by Metro's failure to remove the house located on the site may reasonably be determined to be binding upon Metro. Mr. Stoll granted the fifteen-day extension and promised to add it at the end of the contract period, if needed. There can be no dispute that the additional fifteen days were needed.

We disagree with the trial court's conclusion that the deadline for substantial completion of the project was July 29, 2004. The trial court arrived at this date by taking the substantial completion date of July 15, 2004, contained in Change Orders 1 and 2 and adding, apparently at the suggestion of Metro, fourteen days because Bob Heffington, Metro's project manager, approved in writing a proposal to "make kitchen hood and mechanical equipment room piping and cooling tower piping changes" that requested fourteen days of additional contract time to perform the changes. Using that rationale, A&S would also have been entitled to an additional eighteen days for the June 3, 2004 proposal relating to providing an outside air supply for three heat pumps in the Shayne Elementary School containing a request for an additional eighteen days that was approved by Metro's architect by e-mail.

We are further of the opinion that a substantial completion date cannot be ascertained without a determination of whether A&S is entitled to a contract extension relating to providing ceiling diffusers at Shayne Elementary School. By letter dated June 15, 2004, A&S quoted the cost of providing the diffusers and requested an additional forty days of contract time after authorization for their installation. Mr. Heffington returned this letter with the notation, "Proceed with installation. Time extension to be determined." We interpret this response to mean that Metro would determine

whether additional contract time should be granted in accordance with the construction contract between Metro and A&S. In order to arrive at a substantial completion date, the trier of fact must determine whether A&S would have been entitled to additional contract time in accordance with the provisions of the construction contract outlined above.

Metro's handling of A&S's proposal relating to the addition of ceiling diffusers at Shayne Elementary School points to another genuine issue of material fact between the parties: good faith. Without regard to whether A&S would be entitled to a contract extension for installation of the diffusers, A&S was representing to Metro that it would take forty days after authorization was received to obtain and install the ceiling diffusers. Metro instructed A&S to proceed with the installation on June 28, 2004, seventeen days before the time at which Metro was insisting that the project be substantially complete. Assuming, as we must when reviewing a trial court's action on a motion for summary judgment, that A&S's representation with regard to the time required for installation was reasonable, could Metro, in good faith, approve work that the contractor represented would take forty days and, at the same time, insist that there were only seventeen more days within which to substantially complete the construction?

Every contract imposes upon the parties a duty of good faith and fair dealing in the performance and interpretation of the contract. Wallace v. Nat'l Bank of Commerce, 938 S.W.2d 684, 686 (Tenn. 1996); Elliott v. Elliott, 149 S.W.3d 77, 84-85 (Tenn. Ct. App. 2004). Each party to a contract promises to perform its part of the contract in good faith. The purpose of this covenant that the law implies is two-fold. First, it honors the contracting parties' reasonable expectations relative to the contract. Barnes & Robinson Co. v. OneSource Facility Servs., Inc., 195 S.W.3d 637, 642-43 (Tenn. Ct. App. 2006). Second, it protects the rights of the parties to receive the benefits of the agreement they entered into. Id.

Throughout 2004, Metro made many changes and additions to the scope of the work A&S was to perform under the contract. On numerous occasions A&S made written requests for additional contract time in order to complete the additional work. These requests went largely unanswered. At the same time, A&S alleges, it was being assured that additional contract time would be allowed to complete the project. Pursuant to the contract, the fact that such requests were pending did not excuse A&S from continuing performance. It appears that Metro was determined that these schools would be open by the upcoming school year. Metro knew A&S was behind in the construction schedule because of the soil condition problems at the site. Joe Miller, A&S' project manager, testified that "[i]f there were never another change made to that project and everybody clearly understood the scope of work that was to be performed and could have gone out there and worked without any interference from any outside party, that project could have been done." If Metro made numerous changes in the project work that it knew would cause completion of the project to be delayed, the trier of fact could determine that Metro had a good faith obligation to extend the substantial completion deadline upon the request of A&S.

It appears from the record that A&S was, on July 14, 2004, provided a change directive in which many of the requests for additional time were denied. Metro now takes the position that A&S

did not provide sufficient information for Metro to determine that a contract extension should be granted. If that is the case, should Metro in good faith have so informed A&S when the requests were submitted, rather than wait until the day prior to the day that Metro insisted was the deadline for substantial performance to inform A&S that it was denying its requests for additional time? In our opinion, whether the parties acted in good faith is a genuine issue of material fact that should be presented to the trier of fact on remand.

Next, we come to the issue of waiver. The trial court determined that A&S and OFIC had identified no acts of Metro indicating that Metro had waived its right to rely on the "time is of the essence" clause. Under the law, a contract providing that time is of the essence is enforceable, and failure to meet the specific and explicit time requirements constitutes a breach which permits the non-defaulting party (here, Metro) to terminate the contract. LauLin Corp. v. Concord Properties, No. 03A019502-CH-00047,1995 LEXIS 582, *12-13, 1995 WL 511947, *4 (Tenn. Ct. App. Aug. 30, 1995). The non-defaulting party may, however, by conduct indicating an intention to regard the contract as still in force after the other party's default, waive a provision in the contract making time of the essence. Id. Thus, an owner, knowing construction will not be completed before the deadline, who allows the contractor to continue working after the deadline and encourages the contractor to finish the job, waives his right to terminate under a "time is of the essence" provision. See Shepherd v. Perkins Builders, 968 S.W.2 832, 833 (Tenn. Ct. App. 1997).

At all times material to this issue, Metro insisted that July 15, 2004 was the deadline for substantial performance. Yet, as stated above, Metro made changes in the work that Metro had reason to know could not be completed by that date. Metro allowed A&S to continue with construction after that date. Metro made three changes in the plans and specifications following the July 15, 2004 deadline. Metro arranged with A&S to extend the construction schedule into the fall months in order to accommodate incoming school students. After July 15, 2004, Metro approved requests by A&S that subcontractors be allowed to accelerate their work. We are satisfied that the trier of fact could reasonably conclude that Metro waived the "time of the essence" provision, and so we reverse the trial court on this issue.

A&S alleges that the trial court erred in ruling that Metro did not have to provide A&S with notice of default and an opportunity to cure asserted defects. A&S correctly states that Tennessee courts, recognizing the implied duty of good faith and fair dealing, have held that, before terminating a contract for defective performance, an owner must give a contractor notice of defective performance and a reasonable opportunity to cure those defects. Carter v. Krueger, 916 S.W.2d 932, 935 (Tenn. Ct. App. 1995); McClain v. Kimbrough Constr. Co., 806 S.W.2d 194, 198-99 (Tenn. Ct. App. 1990). Here, the trial court only found A&S to be in default for breach of the "time of the essence" clause. The cited cases have no application to such a default and the trial court's ruling as to that issue was correct.

The contract between the parties in this case provided that Metro had the right at any time to direct A&S to suspend performance "for any reason whatsoever, or without reason." In case of termination without cause, A&S had certain remedies. In case of termination for cause, Metro had

certain remedies. Metro has alleged two causes, a violation of the "time of the essence" clause and defective workmanship. In our view, in order to establish that A&S breached the contract by providing defective workmanship, Metro must prove that it provided notice of the defects and an opportunity to cure the defective construction.

IV. CONCLUSION

We reverse the judgment of the trial court granting partial summary judgment to Metro. This matter is remanded to the trial court for further proceedings consistent with this opinion. The costs of this appeal are assessed to the Metropolitan Government of Nashville and Davidson County.

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DONALD P. HARRIS, SENIOR JUDGE